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Bugging, American Style

The gist of the Solicitor General's shocking admission to the Supreme Court in the Fred B. Black Jr. bugging case can be summarized very simply: J. Edgar Hoover has had, at least until just lately, a standing authorization to violate the law whenever he thought he could serve the public interest by doing so. The Solicitor General put it more tactfully, of course:

> Under Departmental practice in effect for a period of years prior to 1963, and continuing into 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as that in question for intelligence (and not evidentiary) purposes when required in the interest of internal security or national safety, including organized crime, kidnapings and matters wherein human life might be at stake. Acting on the basis of the aforementioned Departmental authorization, the Director approved installation of the device involved in the instant case.

Two years before Mr. Hoover approved installation of a "spike-mike" into Mr. Black's hotel suite, the Supreme Court had said emphatically and unanimously in the *Silverman* case that such an installation violated rights guaranteed by the Fourth Amendment. The two situations are indistinguishable. Moreover, they are not made any less so by the Solicitor General's effort to distinguish between "intelligence" and "evidentiary" purposes. It is mischievous nonsense to suggest that law enforcement authorities may do what the Constitution forbids provided they do not intend to use the information obtained by their lawlessness for the prosecution of their victim. One might as reasonably contend that the FBI can break into a man's house and search it without a warrant so long as prosecution is not its purpose. Such a doctrine would leave Americans without any rights of privacy and without any protection against police arbitrariness.

Solicitor General Marshall's remarkable memorandum to the Court has the effrontery, in addition, to say that the doctrine will be applied in the future whenever the Attorney General thinks that it will serve the national security:

> Present Departmental practice, adopted in July, 1965, in conformity with the policies declared by the President on June 30, 1965, for the entire Federal establishment, prohibits the use of such listening devices (as well as the interception of telephone and other wire communications) in all instances other than those involving the collection of intelligence affecting the national security. The specific authorization of the Attorney General must be obtained in each instance when this exception is invoked.

There is not a syllable in the Fourth Amendment or in the Federal Communications Act that makes an exception for national security. There is not a syllable in the Fourth Amendment or in the Federal Communications Act that empowers the Attorney General—or even the President—to authorize exceptions. This is a government of laws under a fundamental charter—not a police state where a commissar can make or break laws on the supposition that the end justifies the means.